Nissha Industrial and Trading (M) Sdn Bhd v Coco Floor Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-121–03 OF 2018
SM KOMATHY J
22 JANUARY 2019

Civil Procedure — Summary judgment — Application for — Whether application for summary judgment should be allowed — Whether amount of claim correct — Whether plaintiff entitled to claim interest for late payment — Whether defendant agreed to fix exchange rate — Whether defendant's counterclaim should be allowed — Rules of Court 2012 O 14

This was an application by the plaintiff for summary judgment on its claim against the first and second defendants. The claim against the first defendant, the buyer, was for the price of goods sold and delivered, and the claim against the second defendant was based on a guarantee dated 22 December 2014. The plaintiff sold and delivered floor tiles ('the goods') to the first defendant from time to time pursuant to orders made by the latter. Invoices and monthly statements of account were issued to the first defendant in respect of the goods delivered. The invoices required payment within 60 days from the date on the invoice. The first defendant confirmed as correct the monthly statements of account for the months of January–August 2017. By letter dated 19 April 2017, the plaintiff sought payment of the sum of RM1,227,431.86 as acknowledged by the first defendant as correct as at 31 March 2017. By the same letter the plaintiff notified the first defendant that in view of its delay in making payments, it had no alternative but to impose late payment interest at the rate of 1.5% per month with effect from 1 May 2017. The plaintiff received no payments from the first defendant after September 2017. On 12 March 2018, the plaintiff instituted this action claiming a sum of RM1,085,219.23 and late payment interest at the rate of 1.5% per month from the first defendant and USD184,000 and late payment interest at the rate of 1.5% per month from the second defendant based on the letter of guarantee dated 22 December 2014. The defendants filed a defence denying liability to pay the sum claimed. The first defendant also filed a counterclaim alleging that the plaintiff had breached an implied agreement between them to share profits from the sale of the goods and sought a sum of RM3m as special damages. The plaintiff filed the present application for summary judgment on 1 June 2018. The defendants resisted the application on four main grounds contending that there were triable issues as to: (a) whether the amount claimed was correct; (b) whether the plaintiff was entitled to claim late payment interest; (c) whether the plaintiff and the second defendant had agreed to fix the

A exchange rate at USD1 to RM3.35 when they signed the guarantee; and (d) whether the first defendant had a plausible and bona fide counterclaim.

Held, allowing the plaintiff's application with costs of RM5,000:

B (1) On the issue of the alleged payment to the plaintiff of RM10,000 on 31 October 2017, the court agreed that in the absence of any credible evidence to support the payment allegedly made, it could not be argued that this constituted a triable issue (see para 10).

C (2) The court agreed with the defendants that the plaintiff's claim for late payment interest was a triable issue as it was trite law that a seller could not impose late payment interest unless it was made known to and agreed by the buyer. The fact that the first defendant acknowledged as correct the sum claimed in the monthly statements of accounts as correct did not preclude it from disputing the plaintiff's claim for late payment interest D (see para 11).

(3) The court agreed with the plaintiff's contention that the allegation that the parties had agreed on the exchange rate was without basis and if indeed there was so, it would have been mentioned in the guarantee. Further, there would have been no need to peg the guarantee in USD. E The court found that this was a completely hopeless argument by the defendants (see para 12).

(4) The contents of the defendant's letter supported the inference that the counterclaim raised in these proceedings was nothing more than an F afterthought by the defendants to concoct a defence to defeat the summary judgment application. It is elementary law that if a defendant puts forward a counterclaim which is bona fide and plausible, then that is a valid ground for unconditional leave to defend. The counterclaim in the present case did not meet the criterion of being either bona fide or G plausible. From the point of view of O 14, it did not have the merit which entitled it to be taken into account in order to defeat the plaintiff's clear entitlement to an O 14 judgment on the outstanding principal amount (see para 14).

H **[Bahasa Malaysia summary**

Ini adalah permohonan oleh plaintif untuk penghakiman terus berhubung tuntutannya terhadap defendan-defendan pertama dan kedua. Tuntutan terhadap defendan pertama, pembeli, adalah untuk harga berangan yang dijual dan dihantar, dan tuntutan terhadap defendan kedua adalah berdasarkan I jaminan bertarikh 22 Disember 2014. Plaintif telah menjual dan menghantar jubin lantai ('barangan tersebut') kepada defendan pertama dari masa ke semasa menurut pesanan-pesanan yang dibuat oleh defendan pertama. Invois-invois dan penyata-penyata akaun bulanan telah dikeluarkan oleh defendan pertama berkaitan barangan tersebut yang telah dihantar.

Invois-invois tersebut menghendaki bayaran dibuat dalam tempoh 60 hari dari tarikh invois. Defendan pertama mengesahkan yang penyata-penyata bulanan tersebut adalah betul untuk bulan-bulan Januari–April 2017. Melalui surat bertarikh 19 April 2017, plaintif telah memohon bayaran sejumlah RM1,227,431.86 sepertimana diakui oleh defendan pertama sebagai betul sehingga 31 Mac 2017. Melalui surat yang sama plaintif telah memberitahu defendan pertama bahawa berdasarkan kelewatannya membuat bayaran, ia tiada alternatif lain tetapai untuk mengenakan faedah bayaran lewat pada kadar 1.5% setiap bulan bermula dari 1 Mei 2017. Plaintif tidak menerima apa-apa bayaran daripada defendan pertama selepas September 2017. Pada 12 Mac 2018, plaintif telah memulakan tindakan ini menuntut jumlah RM1,085,219.23 dan faedah bayaran lewat pada kadar 1.5% setiap bulan daripada defendan kedua berdasarkan surat jaminan bertarikh 22 Disember 2014. Defendan-defendan memfailkan pembelaan menafikan liabiliti untuk membayar jumlah yang dituntut. Defendan pertama juga memfailkan tuntutan balas dengan mengatakan bahawa plaintif telah melanggar satu perjanjian tersirat antara mereka untuk berkongsi keuntungan daripada jualan barangan tersebut dan memohon sejumlah RM3 juta sebagai ganti rugi khas. Plaintif telah memfailkan permohonan ini untuk penghakiman terus pada 1 Jun 2018. Defendan-defendan membantah permohonan itu atas empat alasan dengan menegaskan bahawa terdapat isu-isu yang perlu dibicarakan berhubung: (a) sama ada jumlah yang dituntut adalah betul; (b) sama ada plaintif berhak menuntut faedah bayaran lewat; (c) sama ada plaintif dan defendan kedua bersetuju untuk menetapkan kadar pertukaran pada USD1 kepada RM3.35 semasa mereka menandatangani jaminan tersebut; dan (d) sama ada defendan pertama mempunyai tuntutan balas yang munasabah dan berniat baik.

Diputuskan, membenarkan permohonan plaintif dengan kos sebanyak RM5,000:

(1) Berhubung isu bayaran yang dikatakan kepada plaintif berjumlah RM10,000 pada 31 Oktober 2017, mahkamah bersetuju bahawa dengan ketiadaan apa-apa keterangan yang boleh dipercayai untuk menyokong bayaran yang dikatakan telah dibuat, ia tidak boleh dihujahkan bahawa ini merupakan isu yang boleh dibicarakan (lihat perenggan 10).

(2) Mahkamah bersetuju dengan defendan-defendan bahawa tuntutan plaintif untuk faedah bayaran lewat adalah isu yang boleh dibicarakan kerana ia adalah undang-undang lapuk bahawa seorang penjual tidak boleh mengenakan faedah bayaran lewat kecuali ia diberitahu dan dipersetujui oleh pembeli. Fakta bahawa defendan pertama mengakui sebagai betul jumlah yang dituntut dalam penyata-penyata akaun adalah betul tidak menghalangnya daripada mempertikaian tuntutan plaintif untuk faedah bayaran lewat (lihat perenggan 11).

(3) Mahkamah bersetuju dengan hujah plaintif bahawa pengataan yang pihak-pihak telah bersetuju dengan kadar pertukatan adalah tanpa asas dan jika sedemikian, ia sepatutnya telah dinyatakan dalam jaminan tersebut. Selanjutnya, tidak ada keperluan untuk memegang jaminan itu dalam USD. Mahakamh mendapati bahawa ini satu hujah yang langsung tidak berasas oleh defendan-defendan (lihat perenggan 12).

(4) Kandungan surat defendan menyokong inferens bahawa tuntutan balas yang ditimbulkan dalam prosiding-prosiding tersebut tidak lebih daripada suatu yang telah difikirkan kemudian oleh defendan-defendan untuk mereka-reka pembelaan bagi menggagalkan permohonan penghakiman terus. Ia adalah undang-undang asas bahawa jika defendan mengemukakan tuntutan balas yang berniat baik dan munasabah, maka ia adalah alasan sah bagi kebenaran tanpa syarat untuk membela. Tuntutan balas dalam kes ini tidak memenuhi kriteria sama ada berniat baik atau munasabah. Berdasarkan A 14, ia tidak mempunyai merit yang melayakkannya diambil kita bagi tujuan menggagalkan hak plaintif yang jelas untuk penghakiman A 14 berhubung baki jumlah prinsipal (lihat perenggan 14).]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9868–9950.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)

Legislation referred to

Rules of Court 2012 O 14

Sivaram Prasad (Christopher & Lee Ong) for the plaintiff.
Arifah bt Abd Aziz (Tengku Azlina, Rao, Low & Assoc) for the defendants.

SM Komathy J:

[1] This is an application by the plaintiff for summary judgment on its claim against the first and second defendants. The claim against the first defendant, the buyer, is for the price of goods sold and delivered, and the claim against the second defendant is based on a guarantee dated 22 December 2014.

NARRATIVE

[2] The plaintiff sold and delivered floor tiles ('the goods') to the first defendant from time to time pursuant to orders made by the latter. Invoices

and monthly statements of account were issued to the first defendant in respect of the goods delivered. The invoices required payment within 60 days from the date on the invoice. The first defendant confirmed as correct the monthly statements of account for the months of January–August 2017.

[3] By letter dated 19 April 2017, the plaintiff sought payment of the sum of RM1,227,431.86 as acknowledged by the first defendant as correct as at 31 March 2017. By the same letter the plaintiff notified the first defendant that in view of its delay in making payments, it had no alternative but to impose late payment interest at the rate of 1.5% per month with effect from 1 May 2017. In response, the first defendant by letter dated 22 June 2017, stated, inter alia, that 'we would like to apologise for the delay of our payment. It was due to the current market situation and delayed payment from our clients ... Will try our best to clear the outstanding by the end of the year ... Another option was to clear the outstanding by 24 months. We hope you could consider our proposal as time are really bad for collection'. The first defendant enclosed six post dated cheques with the said letter.

[4] The plaintiff rejected the proposal on receiving the first defendant's letter and informed the first defendant that the timeline for the settlement was too long. The plaintiff banked in the six cheques sent by the first defendant without prejudice to its rights to bring an action against the latter. The plaintiff received no payments from the first defendant after September 2017.

[5] On 12 March 2018, the plaintiff instituted this action claiming a sum of RM1,085,219.23 and late payment interest at the rate of 1.5% per month from the first defendant, and USD 184,000 and late payment interest at the rate of 1.5% per month from the second defendant based on the letter of guarantee dated 22 December 2014. The guarantee provided that the second defendant's total liability 'shall not exceed in aggregate the total sum of USD184,000 only (or equivalent in Ringgit Malaysia) together with interest thereon as stated in clause 4 ...'.

[6] The defendants filed a defence denying liability to pay the sum claimed. The first defendant also filed a counterclaim alleging that the plaintiff had breached an implied agreement between them to share profits from the sale of the goods and sought a sum of RM3m as special damages.

[7] The plaintiff filed the present application for summary judgment on 1 June 2018. In support of its application, the plaintiff exhibited invoices, statement of accounts and its correspondence with the first defendant.

[8] The defendants resisted the application on four main grounds contending that there were triable issues as to:

A (a) whether the amount claimed was correct;

(b) whether the plaintiff was entitled to impose and claim late payment interest;

B (c) whether the plaintiff and the second defendant had agreed to fix the exchange rate at USD1 to RM3.35 when they signed the guarantee; and

(d) whether the first defendant had a plausible and bona fide counterclaim.

C **[9]** The principles governing a summary judgment have been considered in numerous cases. Gunn Chit Tuan SCJ in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 observed:

> D The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd*; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery* E *Co* that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash*).

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And, Mohamed Azmi SCJ added:

> G Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues H of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

I **[10]** The first issue which the defendants sought to advance relied upon an alleged payment to the plaintiff of RM10,000 on 31 October 2017. It was said that the amount claimed in the statement of claim was incorrect as no credit had been given for the said sum. The plaintiff contended, and I agree, that in the absence of any credible evidence to support the payment allegedly made, it

could not be argued that this constituted a triable issue. A

[11] I turn now to consider the second issue. The defendants contended that the plaintiff had no right to unilaterally impose late payment interest. It was pointed out that the plaintiff had not informed the defendants when the goods were ordered that late payment interest would be imposed and nor was it stated in any of the invoices. It was only stated in the monthly statement of accounts. In meeting this point, the plaintiff contended that as the first defendant had acknowledged the monthly statements of accounts as correct, the defendants was estopped from disputing the plaintiff's right to impose late payment interest. I agree with the defendants that the plaintiff's claim for late payment interest is a triable issue as it is trite law that a seller cannot impose late payment interest unless it has been made known to and agreed by the buyer. The fact that the first defendant acknowledged as correct the sum claimed in the monthly statements of accounts as correct does not preclude it from disputing the plaintiff's claim for late payment interest. B C D

[12] That brings me to the third issue. The defendants contended that the plaintiff's claim against the second defendant on the guarantee for USD184,000 or the Ringgit Malaysia equivalent on payment was a triable issue as the parties had agreed, at the date of the guarantee, to fix the exchange rate at USD1 to RM3.35. In response, the plaintiff contended that the allegation that the parties had agreed on the exchange rate was without basis and if indeed there was so, it would have been mentioned in the guarantee. I agree, and further there would have been no need to peg the guarantee in USD. In my judgment this is a completely hopeless argument by the defendants. E F

[13] That finally leaves the question of the counterclaim. It was common ground that the plaintiff imported the goods from Korea, and sold them to the first defendant who in turn resold it to its customers. The counterclaim raised a number of allegations against the plaintiff. The nub of them was that there was an implied agreement between the first defendant and the plaintiff pursuant to which the former was given the exclusive rights by the latter to purchase and distribute the goods in Malaysia. In breach of this agreement, the plaintiff had sold the goods directly to its (the first defendant's) customers and dealt with other dealers. As a result of which it is said the first defendant had suffered very substantial loss of profit. However, no particulars were given as to how the sum of RM3m claimed as special damages was arrived at. G H

[14] It is not at all clear that in the present case the first defendant in fact have a plausible counterclaim. First and foremost, it is completely contradicted by the defendants' own letter dated 22 June 2017. If indeed there was an implied agreement to share profits, it was inexplicable why it was not raised in the defendants response when the plaintiff sought payment of the outstanding I

A sum. The contents of the defendant's letter, as suggested by the plaintiff, support the inference that the counterclaim raised in these proceedings was nothing more than an afterthought by the defendants to concoct a defence to defeat the summary judgment application. It is elementary law that if a defendant puts forward a counterclaim which is bona fide and plausible, then
B that is a valid ground for unconditional leave to defend. In my judgment the counterclaim here does not meet the criterion of being either bona fide or plausible. From the point of view of O 14, it does not have the merit which entitles it to be taken into account in order to defeat the plaintiffs' clear entitlement to an O 14 judgment on the outstanding principal amount.

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[15] The defendants also did not satisfy the court 'that there ought for some other reason to be a trial' of the plaintiff's claim.

D **[16]** For the reasons given, I allow the plaintiff's application against the defendants for the outstanding principal amount in the sum of RM1,085,219.23, and order the claim for late payment interest to go for trial. The defendants are ordered to pay the plaintiff costs of RM5,000.

E *The plaintiff's application allowed with costs of RM5,000.*

Reported by Mohd Kamarul Anwar

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